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*Don't let it drop on chief*

In the Queen's Bench

APPEAL FROM

WM. VONDERVELDEN,

*Appellant,*

DENNIS BRADY,

*Respondent.*

RESPONDENT'S CASE.

*File 29*

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PROVINCE OF CANADA,  
LOWER CANADA.

Court of Queen's Bench  
APPEAL SIDE.

WILLIAM VONDENVELDEN,

Defendant in the first Court below,

against

Appellant.

DENNIS BRADY,

Plaintiff in first Court below,

Respondent.

RESPONDENT'S CASE.

The said Dennis Brady brought an action, in the Circuit Court for Richmond, under 14 & 15 Vic. c. 22, and 16 Vic. c. 205, to eject the said William Vondenvelden from N. W. half of Lot 5 in 5th Range, Kingsey. The action was founded upon letters patent of said land, issued to said Brady 25th January, 1855. The said Vondenvelden, the present appellant, obtained delay to sue one Joseph Cheney *en guarantee*. His action *en guarantee* failed. He then answered Brady's action to the following purport: That he was proprietor of a portion of lot number six in the fifth range of Kingsey, and that a portion of the land claimed by Brady, upon which was a mill and mill privilege, was upon lot number six in the fifth range of Kingsey, and lay between the N. W. half of lot number 5, and one Joseph Francœur, whose land is set up in Brady's declaration as contiguous to the N. W. half of number five, and concluded that Brady's action would be dismissed if he persisted in this designation of the boundary of the N. W. half of 5 in the 5th range. In substance the said Vondenvelden demanded a *bornage* between lot number 5 and 6, by a plea to a petitory action to recover the N. W. half of lot number 5. This plea was answered by Brady by a general denial of the allegations. Parties went to proof, and Brady established that Vondenvelden was in possession of the north-west half of number 5 in 5th range, by several witnesses; and to put the question beyond a doubt, Brady filed a declaration for having occasioned damage to the identical mill which the said Vondenvelden, in this cause, claimed to be upon number 6 in 5th range. (Vide Plaintiff's exhibit A.) wherein he gives the following description in his own hand writing: "Le demandeur dans cette cause est propriétaire aussi possesseur d'un compain de terre dans le cinquieme rang, au nord est de l'autre coté par John Donahue sur lequel compain de terre  
"borne au sud par le quatrieme rang, au nord est de l'autre coté par John Donahue sur lequel compain de terre  
"est un moulin neuf a farine."

The said Vondenvelden also filed in this cause, in the Circuit Court, a deed of exchange from Joseph Cheney dated 28th November, 1848, by which he acquired the N. W. half of lot number five in the fifth range, and upon which he brought his action *en guarantee* before mentioned, in which deed the said north-west half of lot number five in the fifth range is described in the same manner as Brady described it in this action, and as having upon it "une maison, un grange, unetable et aussi moulin à farine, à scie, chausse etang d'eau" &c. (Vide Defendant's Exhibit No. 3.)

Mr. Vondenvelden also filed a proces verbal of Survey, (Vide Defendant's Exhibit No. 4.) and *bornage* of one L. Legendre of date July 1838, whereby a *bornage* was had between the said Joseph Cheney then in possession of North West half of No. 5, and one Antoine Janolle, then in possession of South-East part of No. 6, in 5th Range. By this *bornage* the respective possessors of these lots, occupied, and by it their respective possessions were determined as well during their term of possession, as of their successors, up to the date of the institution of the action now in appeal. In 1838, when Joseph Cheney commenced the *en demeure* not to erect the dam (Vide Plaintiff's exhibit B.) In 1852, when the said Vondenvelden commenced to rebuild the dam, Brady again protested him. (Vide Plaintiff's Exhibit C.)

The only evidence adduced by Vondenvelden was that of Patrick Daly who made an *ex parte* measurement without establishing any line whatever, and that of two persons who accompanied him. This measurement was wholly irregular and imperfect, and neither confirmed or impeached the survey of Legendre, and appears to have been quite as unsatisfactory to said Vondenvelden as to Brady, for in a subsequent petition filed of record he impeaches it and represents himself as "grievously oppressed" by said Surveyor. The case having been thus submitted to the Court, the following judgment was rendered on the 15th May, 1857, by the Honorable Edward Short, sitting in the Circuit Court at Richmond.

"The Court having perused and examined the declaration, pleas evidence and proceedings of record in this cause, heard the parties on the merits, the Plaintiff by his Counsel and on the whole maturely deliberated; declares the Plaintiff to be the owner and proprietor of the North-West half of Lot number five, in the fifth Range of the township of Kingsey in the district of Saint Francis, bounded on the North-East by the Sixth Range of Kingsey, aforesaid, and by the land of Enos Courtois; on the South-East by the South-East half of the same lot occupied by John Donahue; on the South-West by the fourth Range of said township by land of John Wentworth, and on the North-West by lot numbered six in the said fifth Range said Plaintiff in twenty days after signification of this judgment that part of said lot being the North-West half of said lot number five in the fifth Range of Kingsey, aforesaid, with the exception of three acres more or less on the North-East corner thereof occupied by Hubert Boisvert and Godfrey Boisvert and by a School House, of which he is in possession, and to pay the said Plaintiff his costs of suit, distrains to Messrs Sanborn & Brooks, Plaintiff's Attorneys, dismissing the Defendant's exceptions filed in this cause, and also rejecting the other conclusions of Plaintiff's declaration."

The said William Vondenvelden instituted an appeal against this judgment to the Superior Court, at Sherbrooke, and on the 10th June 1857, the Honorable Judges Badgely and Charles Mondelst, rendered the following judgment:



"The Court having heard the parties by their respective Counsel, and examined the Petition and reasons of appeal of the Appellant and the Record, proceedings, pleadings and evidence herein, and on the whole deliberated, considering that doubts exist under the evidence of Record in this cause of the correctness of the metes and bounds mentioned in the Plaintiff's declaration, of the said Lot of Land, by him claimed in and by this action, and described in the Letters Patent filed of Record, granting him the said lot as the North West half of Lot number five in the fifth Range of the Township of Kingsey, and considering that the said metes and bounds should be established, the Court doth order that the Record be remitted to the Circuit Court and that *quest faire droit*, upon the matters in contest in this cause by the said Court the metes and bounds of the said lot North-West half of Lot Number Five in the fifth Range of Lots in the Township of Kingsey, be ascertained and verified, and the plan thereof made by sworn Surveyors to be agreed upon and passed by the parties respectively in this cause, within fifteen days from the rendering of the judgment, on failure whereof, to be named by the resident Judge of this District, and the report of such survey and plan shall be made and filed without delay in the said Circuit Court; and for the purpose of said survey it is further ordered, that communication shall be given to and had by the said Surveyors of this record, and the documentary and other evidence of record, and of all papers and documents filed therein; and of such other evidence and documents as the parties may deem it expedient to submit to the Surveyors; and the Court doth in consequence set aside the judgment appealed from in this cause, and doth order that the costs be assessed upon the whole matter in litigation until judgment shall be rendered herein by the Circuit Court, after such survey and plan shall have been made as above directed. It is also adjudged that each party shall pay his own costs in this appeal."

Pursuant to this Judgment three Provincial Surveyors of high standing, Robinson, Oughtred, F. C. Chave, and P. N. Dorion, were agreed upon to make the Survey, and the record was again transmitted to the Richmond Circuit. The Surveyors accomplished the task assigned them with great care and ability, and as respondent maintains, in strict accordance with the law, and particularly in accordance with the 20th section of 12 Vic. c. 35, and made their report to the Circuit Court, as required by said Judgment. This survey which was obtained at an expense of about \$50, was quite as unsatisfactory to Mr Vondenvelden, as that of his own Surveyor, Mr Daly.—In a motion to set aside the report consisting of 18 closely written pages, he has accused these Surveyors of gross malversation and corruption in the discharge of their duties, but has not attempted to sustain these charges by any evidence whatever, nor has he ventured to corroborate his motion of so calumnious a character, by his own affidavit. The case was again submitted to the Circuit Court, and the pretensions of Mr Vondenvelden at this argument were, that the Surveyors had not adopted the proper land marks from which to make their measurements; that when the posts were destroyed, or for any cause could not be found, such land marks as brooks, swamps, trees, &c., as were situated in the field book of original survey, should be taken as the guide of the Surveyor. A sufficient answer to this objection, as a reason from the nature of the case is, that the minutes of the field book of this character, are inaccurate, and if adopted as permanent land marks would lead to endless confusion. The Act above referred to has set all questions as to the duties of Surveyors in such cases, at rest. The course for them to pursue is clearly marked out, and in this instance it was followed. Had any other course been adopted the survey would have been illegal.

On the 14th November last judgment was again rendered in this cause, in the Richmond Circuit, by the Hon. Edward Short, in the following terms:

"The Court having seen and examined the Declaration, pleadings, evidence and proceedings of record, heard the parties by their respective Council, as well on the Plaintiff's motion to homologate the report of the Surveyors and Experts, produced and filed in this cause, and the Defendant's motion to reject and set aside the said Report—as on the merits, doth reject the last mentioned motion, with costs; homologate the said report, adjudge and declare the said Plaintiff to be the lawful owner and proprietor of the parcel of land mentioned in his said declaration, being the North-West half of Lot number five in the fifth Range of the township of Kingsey, the metes and bounds of which have been ascertained and established by the said Surveyors and Experts to be as follows: "Commencing at a bound of squared cedar post, marked "R 5, R 6, 5, 6," with stone and pieces of earthenware thereunder, at the distance of one hundred and twenty-eight chains and forty-three links and a half from the town line between Kingsey and Shipton, which said bound is planted for the most north-westwardly corner of Lot numbered five in the fifth range of the township of Kingsey, in the District of Saint Francis, and planted on the concession line between the fifth and sixth ranges of Kingsey aforesaid, and at the distance of one chain and fifty links towards the south-east from where the brook crosses said concession line. Thence from said last mentioned bound magnetically south thirty nine degrees and forty-five minutes east, along said concession line between the fifth and sixth ranges twelve chains and eighty-four links and three tenths of a link to a bound of cedar post squared, marked "NW 1 V; SE 1 V; V R; VI R;" with stone and pieces of earthenware thereunder, at the most eastwardly corner of the north-west half of said Lot numbered five in said fifth Range; thence magnetically south fifty degrees and fifty-two minutes west along the division line between the north-west and south-east halves of said lot numbered five, seventy-eight chains fifty-four links to a bound of squared cedar post marked "NW 2 V; SE 2 V; IV R; V R;" and stone with pieces of earthenware thereunder, on the concession line between the fourth and fifth ranges of Kingsey aforesaid, at the most southwardly corner of the north-west half of said lot numbered five in said fifth range of Kingsey; thence from said last mentioned bound or corner along the concession line between the fourth and fifth ranges, magnetically north thirty-seven degrees and fifteen minutes west twelve chains and eighty-five links to the original corner between said lots numbered five and six; thence along the side line between lots numbered five and six, magnetically north fifty degrees and fifty-two minutes, east seventy-seven chains and ninety-eight links to the corner post between lots numbered five and six, on the concession line between the fifth and sixth ranges, the place of beginning. The said half lot of land comprised within the above mentioned bounds, containing ninety-five acres two roods and twenty-seven perches in superficial English measure, with the usual allowance of five per cent. for highways, and bounded on the north-east by the sixth range of Kingsey aforesaid; on the south-east by the south-east half of said lot numbered five; on the south-west by the fourth range of said township of Kingsey; and on the north-west by lot number six in said fifth range of Kingsey aforesaid;" and condemn said Defendant to restore and deliver up to said Plaintiff, within twenty days from and after the service upon him of the present Judgment, that part of said parcel of land of which he is in possession, to wit: the north-west half of lot number five in the fifth range of Kingsey, except three acres, more or less, on the north-east corner thereof, occupied by Hubert Beavert and a school house, and to pay the said Plaintiff his costs of suit, distrains to Messrs Sanborn & Brooks, his Attorneys, dismissing the exception filed by the Defendant in this cause, and also rejecting the other conclusions of Plaintiff's Declaration."

This Judgment was rendered before the Judicature Amendment Act came into force, and Mr Vondenvelden again instituted an Appeal to the Superior Court at Sherbrooke, and after hearing the parties the Honorable Chief Justice Bowen pronounced the following Judgment on the 30th day of January last:

"The Court having seen and examined the Record and proceedings in this cause had before the Circuit Court for the Circuit of Richmond, and the Judgment therein rendered on the 14th day of November now respondent by his Attorney, and upon the whole maturely deliberated:

"Considering that in the said Judgment so rendered in the said Circuit Court, upon the day last aforesaid, there is no error, the present Appeal is therefore hereby dismissed with costs to the Respondent, and it is ordered, that the Record be remitted to the Court below, for such further proceedings as to law and justice may appertain."

From this Judgment this Appeal hath been instituted. The tenor of the arguments of Mr Vondenvelden before his Honor the Chief Justice, at the last hearing at Sherbrooke, so far as Respondent was enabled to appreciate them, was, that the Surveyors had not complied with the order in the interlocutory judgment, that they had not determined the metes and bounds of the north-west half of No. 5, in the 5th range of Kingsley. This is contrary to fact; and secondly, that instead of the said N. W. half of five being bounded by Francoeur, Mr Vondenvelden pretends that it should be bounded by him, inasmuch as by some part of the line established by the Surveyors a little more land is given to No. 6 than by Legendre's survey.

This, in quantity, is insignificant; but an incontrovertible answer to this objection is, that Mr Vondenvelden held and possessed what was known, and what he himself had described as the N. W. half of five, and a *bornage*, leaving Francoeur still a neighbor to lot No. 5. The result of the survey was to establish the line between 5 and 6, and Francoeur occupying the north-east portion of 5, his land would extend to the line established by the last survey, in the same manner as it extended to Legendre's line, when that was understood to be the line between 5 and 6. It is proper to notice the titles filed by Mr Vondenvelden. Until this action was instituted, Mr Vondenvelden never pretended to have any possession of any part of No. 5. Happening to have an old and imperfect title to No. 6, without pleading or setting forth his title, he files some documentary evidence to *insinuate* to the Court, for it is nothing more, that he had a title to No. 6. This title could easily be established of no validity, but it was not necessary in this cause to do so, as it was not in issue. It is sufficient for Brady that it appears that Mr Vondenvelden never possessed, or pretended to possess any part of No. 6 under this or any other title, but has, by himself and his *attorneys*, held his possession as the N. W. half of 5, and as contiguous with Francoeur. The scheme by which Mr Vondenvelden wishes to establish forward a fanciful title to give coloring to such possession, is more ingenious than ingenious. Upon reference, however, to the survey, and the last judgment in the Circuit Court, your Honors will perceive that Francoeur is not mentioned as neighbor to N. W. half of five, but the boundaries between N. W. half of five and lot six, are marked and delineated by proper land marks. Thus this objection of Mr Vondenvelden, has in reality no foundation in fact. The Respondent conceives that the Superior Court, in rendering the interlocutory Judgment, ordering a survey, were induced more by a disposition to give Mr Vondenvelden the benefit of a doubt about the *tenance et aboutissements*, than to satisfy themselves of the substantial correctness of Brady's pretensions. That survey has been had, and the report has been confirmed by two Judgments, and Brady, the Respondent, has a confident hope that these Judgments will be confirmed by this Honorable Court.

J. S. SANBORN,  
E. T. BROOKS,  
Attorneys for Respondent.

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